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No. 08-96

FILED
AUG 2 2 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

THE PINEY RUN
PRESERVATION ASSOCIATION,

Petitioner,

v.

COUNTY COMMISSIONERS OF
CARROLL COUNTY, MARYLAND,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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INTRODUCTION

The Petition arises from the Fourth Circuit's decision in *The Piney Run Preservation Association v. County Commissioners of Carroll County, Maryland*, No. 07-1348, published at 523 F.3d 453 (2008).[1] Affirming the lower court's decision, the Fourth Circuit held that Petitioner "failed to meet its high burden of establishing that the [Maryland Department of the Environment ("MDE")] enforcement action does not satisfy" the Clean Water Act's "diligent prosecution" standard under 33 U.S.C. § 1365. (13a.) The Fourth Circuit found that, unable to meet this standard, Petitioner is barred from bringing a separate citizen lawsuit to enforce the permit issued by MDE to Respondent, Carroll County, Maryland. (*Id.*)

While Petitioner offers the conclusory assertion that the case presents "an important federal question" appropriate for Supreme Court review, the relevant authorities and case-specific facts show otherwise. *See* Sup. Ct. R. 10. The published decisions of several other federal appellate courts plainly support the Fourth Circuit's lengthy, well-reasoned opinion.[2] There is no

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[1] This is Appellant's second request for Supreme Court review of a Fourth Circuit decision in this protracted litigation. The Court denied the prior request. *See The Piney Run Preservation Association v. County Commissioners of Carroll County, Maryland*, 535 U.S. 1077, 122 S. Ct. 1960 (2002).

[2] The Fourth Circuit's opinion appears at page 1a of the Appendix of the Petition for Writ of Certiorari. References in this Opposition to the Fourth Circuit's opinion are made pursuant to the page numbers in the Petitioner's appendix.

split in authority among the federal appellate courts over what constitutes a government agency's "diligent prosecution" of violations of the Clean Water Act. In accord with Supreme Court jurisprudence, courts are unanimous that they should show deference to the decisions made by government agencies exercising their delegated authority to enforce environmental laws, especially where the agency is already substantively addressing the same alleged violation that a private citizen wants remedied. The courts repeatedly recognize that private citizen suits are highly disfavored because they carry tremendous potential to disrupt and impede the government's efforts to protect the environment. That is precisely the situation Petitioner seeks to create here and will continue to create if its petition for certiorari is granted. Because no writ of certiorari is warranted here, the Petition should be denied.

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

Since 1975, Respondent Carroll County, Maryland, (the "County") has operated the Hampstead Waste Water Treatment Plant (the "Plant"). The Plant's discharged water ("effluent"), which has been treated with ultraviolet and biological processes, flows into the Piney Run, a trout stream.

In 2000, MDE introduced a temperature limitation into the Plant's discharge permit. The limitation provides that the Plant's effluent may not exceed the greater of 20°C or the ambient temperature of the stream.

The Plant's effluent does not undergo any mechanical heating process during its treatment. However, the treated water is kept in holding tanks until its discharge, and on the hottest days of the summer months, the sun occasionally causes an increase in the temperature of the treated water, as well as of the stream itself. In the daytime hours, the effluent often has the effect of cooling the solar-heated stream. In the evening hours, however, the temperature of the stream occasionally falls at a faster rate than the temperature of the effluent, which results in occasions on which the effluent temperature slightly exceeds both 20°C and the ambient temperature of the stream.

The only reliable way for the County to ensure that the effluent's temperature *never* rises above 20°C or the ambient temperature of the stream is to install and operate industrial cooling towers next to the stream to chill the effluent before it is discharged. Petitioner has argued strongly in favor of this option in prior phases of litigation between the parties. These cooling towers, however, pose serious environmental problems. The machines are noisy and unsightly, emit potentially harmful vapors, use biocides, and consume enormous amounts of electricity when operating. They would be needed only in the early evening hours on the hottest days of the year, when the demand on Maryland's energy supply is at its peak.

The proposed machinery would also impose a heavy financial burden on the taxpayers of Carroll County. Erecting the cooling towers next to the stream would cost $1.7 Million and further generate an estimated

annual operating cost of $35,000.[3] The machines would sit idle for most of the year, but the County would still need to devote resources to their year-round maintenance and security.

Such an onerous and potentially harmful undertaking would not to be justified by the environmental ramifications of the Plant's discharge. While Petitioner has argued that the occasional difference in temperature between the Plant's effluent and the stream harms the trout population, independent studies of the stream do not support that theory. These studies consistently show that the Piney Run trout population has not been declining, and, in fact, may even *benefit* from the Plant's effluent.[4]

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[3] This figure was calculated using early 2007 energy costs. Considering the rapid increase in energy prices since then, the burden on County taxpayers would now be much greater than originally estimated.

[4] The Fourth Circuit Court of Appeals took note of this point in its decision. (*See* 8a n.4)

> "Interestingly, in affirming the administrative decision to modify the permit, the Maryland Court of Special Appeals noted that the administrative law judge found 'that there was no evidence the Plant's discharge had any adverse effect on the aquatic life that naturally occurring conditions would not have' and that he also indicated that '***the discharge may even have a positive effect on the trout population***.'"

(citing *County Comm'rs of Carroll Cty. v. Rowland*, No. 2338, at 30 (Md. Ct. Spec. App. 2006) (emphasis added)).

Accordingly, in 2004, during the first summer under MDE's new temperature limit, the County, mindful of the lack of evidence of any environmental harm and the extreme environmental and financial burden of strict compliance in summer months (i.e., construction and operation of mechanical cooling towers), applied for an "alternate effluent limit" as contemplated by the Maryland regulations. These regulations allow a discharger to apply for a different temperature (or other) limit where it can demonstrate to MDE's satisfaction that the existing limit is "more stringent than necessary to assure the protection and propagation of a balanced, indigenous community" of fish in the stream. *See* COMAR 26.08.03.03E(1).

While the County's application for an alternate effluent limit was pending, MDE filed a Complaint for Injunctive Relief and Civil Penalties against the County for its violations of the Permit's temperature limitation. In July 2006, MDE and the County entered into a Consent Judgment regarding that action, which captured their binding agreement on the appropriate and environmentally sound interim and long-term measures to achieve the underlying goals of the permit's temperature limit. On July 25, 2006, the Circuit Court for Carroll County entered the Consent Judgment.

Entry of the Consent Judgment immediately placed significant obligations and expenses on the County while MDE continued to study the County's request for an alternate effluent limit and the wisdom of forcing the County to build and operate cooling towers. Most important, the Consent Judgment requires the County to fund a large-scale Environmental Project to

responsibly and holistically address the environmental concerns raised by temperature differences in the stream. At the same time, the County continues to accrue civil penalties for any technical temperature violations. Pursuant to the Consent Judgment, the County must:

- incur civil penalties of $500 for each day that the County fails to comply with any temperature effluent limit;

- design and implement an Environmental Project to mitigate any water temperature increases caused by factors other than Plant discharge;

- submit a Study Plan and Schedule for evaluating the thermal effects of storm water released into the Piney Run within the County;

- evaluate the storm water management facilities upstream or in the vicinity of the Plant and the thermal effects of the storm water discharged from those facilities into the Piney Run;

- submit a storm water temperature remediation plan based on the findings of the storm water management evaluation;

- survey and evaluate the status of the riparian buffers from the headwaters of

the Piney Run to a location downstream in Baltimore County, in order to further address thermal aspects of the stream;

- plant and establish a riparian buffer on County-owned property where there is none;

- enhance any existing buffer on County-owned property with supplemental plant stock;

- place the riparian buffer under a conservation easement;

- design and implement a plan for establishing riparian buffers or obtaining conservation easements on properties owned by private landowners in Baltimore County;

- submit documentation on a quarterly basis of progress made, problems encountered and all expenditures incurred in connection with the Environmental Project;

- submit, within 30 days after the completion of the Environmental Project, a completion report containing a detailed description of the Project as implemented, documentation of expenditures made in connection with it, certification that it has been fully

implemented, and a description of the environmental benefits resulting from its implementation;

- if the request for an alternate effluent limit is not approved, submit, within 30 days of the disapproval, a plan identifying the measures the County will take to ensure compliance with the permit; and

- implement the measures for ensuring compliance with the permit within 300 days if the request for an alternate effluent limit is not approved.

(*See* Consent Judgment 20a – 37a.)

The extensive commitments that the County has made in the Consent Judgment carry a considerable financial cost. Implementation of the Environmental Project alone will cost more than $400,000. (46a – 51a.) MDE retains ultimate control of the decision whether to make any change to the Permit's temperature restrictions or force the County to build the cooling towers near the stream. (24a – 26a.) If MDE ultimately decides that strict compliance with the 2004 permit is environmentally desirable, the County must submit a compliance plan within 30 days and come into compliance (i.e., build the cooling towers) within 300 days. (26a – 27a.) It would also be obligated to pay all civil fines accrued to that point for temperature violations. (*Id.*)

On November 14, 2006, more than two months after the Circuit Court entered the Consent Judgment reached by MDE and the County, Petitioner filed a private citizen suit seeking strict enforcement of the 2004 Permit's effluent temperature provisions. (66a.) Petitioner argued that the federal court had subject matter jurisdiction over its private action addressing the same issue at the heart of the Consent Judgment because the steps taken by MDE did not constitute "diligent prosecution" of the 2004 permit. In essence, Petitioner sought – and still seeks – a ruling that the County must *immediately* erect the effluent cooling towers before MDE determines whether (1) the variation in effluent temperature has any adverse impact on the environment or (2), if any such adverse impact exists, the impact can be cured through natural and environmentally responsible means.

The District Court and Fourth Circuit each briskly rejected Petitioner's arguments and held that the actions taken by MDE easily met the "diligent prosecution" standard.

REASONS FOR DENYING THE PETITION

A. There Is No Split of Authority and the Fourth Circuit's Decision Does Not Conflict with Any Decisions of This Court or the Other Courts of Appeals.

Petitioner acknowledges that there is no split of authority in the federal appellate courts on the issue of what constitutes "diligent prosecution" of purported violations of the Clean Water Act under 33 U.S.C. § 1365(b)(1)(B). Instead, it only alleges that in prior federal appellate cases where the court found the relevant agency had met the "diligent prosecution" standard, the alleged violations had to be cured by a certain fixed date. It then argues that here, merely because MDE has reserved the discretion on when to render its decision on whether effluent temperature limits are environmentally beneficial and appropriate, the Fourth Circuit has somehow erred due to a lack of sufficient guidance from this Court on how to render a sound decision. Relevant case law simply does not support Petitioner's argument.

B. The Fourth Circuit Properly Followed the Well Settled Legal Rule: Environmental Agencies' Decisions on How to Enforce Environmental Protection Laws Are Entitled to Great Deference.

The current standard utilized by the appellate and district courts consistently allows government agencies to exercise their Congressionally-delegated authority to protect the environment while also preserving citizens' rights to file private actions in those rare

instances where government agencies truly fail to do so. *Compare, e.g., Karr v. Hefner*, 475 F.3d 1192 (10th Cir. 2007) (holding "diligent prosecution" standard was met where EPA chose to enter consent decree with only two of nine defendants); *North and South Rivers Watershed Ass'n v. Town of Scituate*, 949 F.2d 552, 555-56 (1st Cir. 1992) (holding "diligent prosecution" standard was met by State Administrative Order despite agency's decision not to assess financial penalty) *with Friends of Milwaukee's Rivers v. Milwaukee Metropolitan Sewerage Dist.*, 382 F.3d 743, 752-53 (7th Cir. 2004) (holding 25 year-old stipulation that failed to remedy discharge of untreated sewerage into city's waterways in clear violation of Clean Water Act did not constitute "diligent prosecution" by the agency). The current standards have not created any confusion in the lower courts, nor have they allowed Clean Water Act violations to go unpunished where the government has slept on its enforcement duty.

The Court should not accept Petitioner's invitation to create (and require federal judges to subsequently enforce) novel, inflexible rules that environmental agencies must strictly obey or risk being ensnared in duplicative private citizen lawsuits. Doing so would frustrate Congressional intent, conflict with the traditional deference shown by courts, and substantially interfere with those agencies' efforts to craft environmentally sound, case-specific solutions.

1. Government action to enforce the Clean Water Act is entitled to great deference, making citizen suits appropriate only where the government has categorically failed to act

When analyzing the propriety of private citizen suits under 33 U.S.C. § 1365(b)(1)(B), federal courts have consistently recognized the need for considerable deference to the government agencies enforcing environmental laws. *See North and South Rivers Watershed Ass'n*, 949 F.2d at 555 ("Where an agency has specifically addressed the concerns of an analogous citizen's suit, deference to the agency's plan of attack should be particularly favored."); *Arkansas Wildlife Fed'n v. ICI Americas, Inc.*, 29 F.3d 376, 380 (8th Cir. 2004) ("[C]ourts must afford appropriate deference to the expertise of the agency enforcing the state's environmental laws.").

Federal appellate courts hold that citizen suits are only appropriate "where Federal and State authorities appear unwilling to act," *Lockett v. Environmental Prot. Agency.*, 319 F.3d 678, 684 (5th Cir. 2003) (quoting *Gwaltney of Smithfield Ltd. v. Chesapeake Bay Found., Inc.*, 489 U.S. 49, 61, 108 S. Ct. 376, 383 (1987)), or "when federal, state and local agencies fail to exercise their enforcement responsibility." *Arkansas Wildlife*, 29 F.3d at 380. Therefore, Petitioner, who seeks to open a second case addressing the same violations that are the subject of a current government enforcement action, carries a heavy burden. *See Karr*, 475 F.3d at 1198 ("This burden is heavy, because the enforcement agency's diligence is presumed.") (internal quotations omitted). Judicial review of the Fourth Circuit's decision affirming

dismissal of this citizen suit would necessarily upset this presumption of deference and should be avoided.

Nothing in Petitioner's brief warrants deviation from the presumption of deference. Petitioner's brief does not allege that MDE's chosen enforcement method is "dilatory, collusive or otherwise in bad faith." *See Connecticut Fund for the Env't v. Contract Plating Co.*, 631 F. Supp. 1291, 1293 (D. Conn. 1986) ("The court must presume the diligence of the state's prosecution of a defendant absent persuasive evidence that the state has engaged in a pattern of conduct in its prosecution of the defendant that could be considered dilatory, collusive or otherwise in bad faith."). It merely hopes the Court will draw a negative inference from the unremarkable fact that this comprehensive and far-reaching Consent Judgment lacks a fixed date for MDE to make its final decision on the County's request for an alternate effluent limit.

The Fourth Circuit and the trial judge, however, each firmly and properly rejected this argument, which had been articulated below. (*See* 15a-16a (finding "the open-ended nature of the Consent Judgment reflects the fact that the County is lawfully seeking an AEL through the state administrative process" and concluding "[w]ithout legitimate evidence that MDE had no intention of acting responsibly on the County's AEL application, we have no basis to impute an improper motive to MDE in this regard."); 18a (holding as a matter of law that "consent judgment . . . and its implementation come comfortably within the relevant standards of 'diligent prosecution'")).

2. *The need for deference is heightened where the government has entered a binding consent judgment, because citizen suits challenging those agreements interfere with the government's ability to enforce environmental laws*

Certiorari is particularly imprudent here because MDE and the County are bound by the Consent Judgment entered in 2006. Judicial support for private citizen suits after entry of a consent judgment carries tremendous risks. In *Gwaltney*, 489 U.S. at 60-61, 108 S. Ct. at 383, this Court explained why government enforcement actions under the Clean Water Act preclude private lawsuits. Recognizing that entities charged with violations will make binding concessions to the agency that they were otherwise not obligated to make, if such concessions will facilitate final resolution of the matter, the Court observes "[i]f citizens could file suit . . . to seek civil penalties that the Administrator chose to forgo, then the Administrator's discretion to enforce the Act in the public interest would be curtailed considerably." *Id.*

Here, the County has made vast concessions by entering the Consent Judgment. It assumed significant and costly obligations under the Environmental Project so that it would not be compelled to immediately erect the mechanical cooling towers. The County reasonably and rightly expects that it will not have to defend a second Clean Water Act suit that contradicts the Consent Judgment and seeks to compel immediate construction of those same machines. *See Arkansas Wildlife*, 29 F.3d at 380 (stating "[i]t would be

unreasonable and inappropriate to find failure to diligently prosecute simply because . . . a compromise was reached").

The opinions of the federal appellate courts are in accord. The Tenth Circuit explains that "when the EPA chooses to enforce the CWA through a consent decree, failure to defer to its judgment can undermine agency strategy." *Karr*, 475 F.3d at 1197. The *Karr* court recognized that "[i]f a defendant is exposed to a citizen suit whenever the EPA grants it a concession, defendants will have little incentive to negotiate consent decrees." *Id.* These same considerations militate against judicial review of the Fourth Circuit's decision affirming dismissal of Petitioner's citizen suit.

3. Citizen suits are exceptional and highly disfavored because Congress and the federal courts recognize that duplicative lawsuits frequently impede environmental protection efforts

Certiorari of this twice-dismissed citizen suit will not advance any environmental goal of MDE, which is already addressing the precise issue raised by Petitioner's complaint. Federal appellate courts have made this point emphatically. *See North and South Rivers Watershed Ass'n*, 949 F.2d at 556 ("Duplicative enforcement actions add little or nothing to compliance actions already underway, but do divert State resources away from remedying violations in order to focus on the duplicative effort."); *Ellis v. Gallatin Steel Co.*, 390 F.3d 461, 477 (6th Cir. 2004) ("Second-guessing of the government's assessment of an appropriate remedy . . .

fails to respect the statute's careful distribution of enforcement authority among the federal EPA, the States and private citizens . . . .") *Arkansas Wildlife*, 29 F.3d at 380 (stating "Congress intended citizen suits brought pursuant to 33 U.S.C. § 1365 to play an 'interstitial,' rather than 'potentially intrusive' role") (quoting *Gwaltney*, 489 U.S. at 60-61, 108 S. Ct. at 382-83). Granting certiorari would frustrate Congress's goals as codified in the Clean Water Act and encourage these disfavored lawsuits.

C. This Case Does Not Present Any Important Federal Questions that Warrant Consideration by This Court.

Petitioner characterizes this case as presenting an "important federal question" but fails to substantiate this characterization. There is no split in the circuits on the parameters of Section 1365(b)(1)(B) "diligent prosecution," and Petitioner offers nothing from courts – or even commentators – that suggests anyone is looking for more guidance on the issue. Petitioner proposes no broader rules that the Court could pronounce to guide lower courts on what constitutes "diligent prosecution." While the question is "important" to Petitioner's efforts to keep its case in federal court, it lacks any real importance as contemplated by the drafters of Supreme Court Rule 10. It is unfit for certiorari.

Moreover, Petitioner's brief offers no clue as to how this Court could possibly isolate and set the "parameters of the 'diligent prosecution' bar to citizen suits" in a judicial decision. The *per se* rule implicitly sought here

by Petitioner – that an agency's decision to enter a Consent Judgment lacking certain deadlines automatically authorizes citizens to bring duplicative lawsuits challenging the same conduct – is much more likely to obstruct than assist the government's efforts to protect the environment. *See Gwaltney*, 489 U.S. at 60-61, 108 S. Ct. at 382-83; *North and South Rivers Watershed Ass'n*, 949 F.2d at 556 ("Duplicative actions aimed at exacting financial penalties in the name of environmental protection at a time when remedial measures are well underway do not further this goal. They are, in fact, impediments to environmental remedy efforts.").

The proposed rule would undermine the Clean Water Act by authorizing private litigants to get into federal court to seek personal environmental remedies and disrupt the government's carefully negotiated consent judgments without adding any benefit to the environment. *See Ellis*, 390 F.3d at 477 (emphasizing that citizens bringing private CWA claims "seek relief not on their own behalf but on behalf of society as a whole, and accordingly 'personalized' remedies are not a first priority of the Act.").

For Petitioner's argument to gain any traction, the Court must first ignore the profound difference between the facts here and in those cases cited by Petitioner, in which polluters were engaged in an ongoing pattern of environmentally destructive activities. *See Friends of Milwaukee's Rivers*, 382 F.3d at 752-53 (allowing citizen suit where defendant had discharged untreated sewage into waterways for 25 years); *Culbertson v. Coats American, Inc.*, 913 F. Supp. 1572, 1579 (N.D. Ga. 1995)

(finding no "diligent prosecution" where state agency's repeated delays allowed continued unlawful discharge of toxic metals into waterways). Under existing legal standards, federal courts have been – and continue to be – willing to question an agency's diligence where it fails to take any meaningful action to stop an ongoing discharge of contaminants into the environment.

There is no reasonable basis, however, to doubt MDE's diligence where it enters a Consent Judgment that affords it additional time to evaluate whether thermal limits on effluent confer *any* environmental benefit whatsoever. In the absence of any data that the temperature variations in the effluent and the stream have harmed the trout population, MDE's decision to enter a Consent Judgment that requires the County to finance and develop a riparian buffer of undisputed benefit to the trout population, the Piney Run, and the environment as a whole is eminently sound. MDE's decisions are especially entitled to deference where, as here, MDE reserves the right to demand strict compliance with the 2004 Permit's thermal effluent provisions and collect all accrued civil penalties. Petitioner's duplicative citizen suit, by contrast, is short-sighted, environmentally irresponsible, and undermines MDE's diligent efforts to resolve this matter. Its dismissal was proper and does not merit any further review.

CONCLUSION

Petitioner invites the Court to do what it and numerous other federal courts consistently state they should not and will not do: judicially prescribe inflexible agency rules for enforcing environmental laws. Government agencies exercising their delegated authority to protect the environment in good faith should not be exposed to the second-guessing and disruption caused by private citizen lawsuits challenging the same conduct that the agency is already addressing. It is not only burdensome but also jeopardizes environmental protection efforts by compromising the government's authority to craft environmentally sound case-specific solutions to various disputes. For these reasons, Respondent County Commissioners of Carroll County, Maryland, respectfully opposes the Piney Run Preservation Association's Petition for Writ of Certiorari.

Respectfully submitted,

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